United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To Be Argued By
William J. Dreyer

Docket No. 74-1668

United States Court of Appeals
For the Second Circuit

KATHLEEN M. FINNERTY, individually and on behalf of all other persons similarly situated,

Appellant,

—against—

JAMES L. COWEN, individually and as Chairman of the Railroad Retirement Board,

and

CASPAR WEINBERGER, individually and as Secretary of Health, Education, and Welfare,

Appellees.

Appeal from the United States District Court for the Northern District of New York

BRIEF FOR APPELLEE

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BRIEF FOR DEFENDANTS - APPELLEES

STATEMENT OF ISSUES

1. In a Constitutional challenge to Federal Administrative Procedures and Federal Statutory Provisions, does appellant's Failure to exhaust administrative remedies bar judicial review when the administrative remedies do not offend due process of law, and when the administrative remedies would reach unresolved factual and legal issues.

2. Is Federal Jurisdiction in the nature of mandamus available when a plaintiff does not show a violation by defendants of a mandatory statutory duty.

3. Does Jurisdiction lie under 28 U.S.C. Section 1331, or 28 U.S.C. Section 1337.

STATEMENT OF THE CASE

Nature of Case and Course of Proceedings

Appellant, Kathleen M. Finnerty, in December, 1973, commenced this class action against the Chairman of the Railroad Retirement Board and the Secretary of Health, Education and Welfare, to challenge the constitutionality of the work deduction provisions of Section 2(e) (i) (1) (ii) of the Railroad Retirement Act, 45 U.S.C. Section 228e (i) (1) (ii), and Section 203 (f) (1) of the Social Security Act, 42 U.S.C. Section 403 (f) (1), on the grounds that the said provisions operate jointly against employed recipients under 72 years of age, and result in a greater deduction for a person receiving benefits under the two programs than for a person receiving benefits under one program; and, further, to enjoin the administration of the said work deduction sections of the Railroad Retirement Act on the grounds that the recoupment procedures to recover benefits paid, fail to provide a recipient with prior notice and a prior hearing. The district court, on January 10, 1974, entered its order granting the defendants' motion to dismiss the plaintiff-appellant's amended complaint and denying and dismissing appellant's motion for designation to proceed as a class action and for the convening of a three judge court. (Joint appendix to appellant's brief pp. A1-A14).[1/] Appellant has appealed from those orders.

Statement of Facts

On August 2, 1960, the appellant, Kathleen M. Finnerty, filed an application for retirement benefits with the Social Security Administration. Mrs. Finnerty

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[1/] Joint appendix to appellant's brief is hereinafter referred to as "appendix." Appendix B refers to this brief's appendix which contains pertinent statutory provisions.

was found to be entitled to retirement insurance benefits effective with May, 1960, the month she became 62 years of age, and, accordingly, was granted benefits at a rate of $42.40 per month. She agreed to and did file annual reports of earnings each year thereafter until 1970. On 1970, Mr. Finnerty received an increased rate of $82.70 per month under the Social Security Act.

On August 29, 1966, after her husband's death, Mrs. Finnerty filed an application for a widow's insurance annuity pursuant to provisions of the Railroad Retirement Act. She was awarded a widow's insurance annuity of $63.40, effective August 1, 1966, and was advised in a pamphlet furnished her to report employment earnings over a specified amount. As a result of subsequent amendments to the Railroad Retirement Act, the monthly rate at various times was increased, so that Mrs. Finnerty was entitled to $75.35 as of January 1, 1970, and to $82.85 as of January 1, 1971.

In 1970, Mrs. Finnerty did not file an annual report of earnings. (appendix, p A39). A social security earnings record maintained by the Social Security Administration showed that Mrs. Finnerty had earned in 1970 an amount in excess of $1,680.00, which was the amount a recipient could earn and continue to receive full benefits under the Social Security Act. On October 22, 1971, pursuant to the Social Security Administration's request, Mrs. Finnerty filed a report of earnings for 1970 which stated that she earned a total of $1,827.08 for that year. (appendix, A40). She also reported that she earned in excess of the monthly exempt amount (then $140.00) only in March, June, July, September, November and December of that year. Since Mrs. Finnerty attained the age of 72 years in May, 1970, and since provisions of the Social Security Act provided that work deductions are not imposable beginning with the month a recipient attains age 72, work deductions

were imposed only for March 1970. Because Mrs. Finnerty reported $146.00 in excess earnings for that month, a deduction of $73.00, or $1.00 for each $2.00 of the first $1,200.00 in excess earnings, was assessed against the monthly benefit for March, 1970. Mrs. Finnerty was advised of her right to request reconsideration or request an administrative hearing on the deduction. She requested neither reconsideration nor an administrative hearing. Subsequent to the deduction being imposed, the Social Security Administration determined that a discrepancy existed between Mrs. Finnerty's report of $1,827.08 in excess earnings, and Social Security Administration records, which reflected $1,946.60 in excess earnings. Because the amount of the discrepancy fell within an administrative tolerance rule, no action was taken to impose further work deductions for the month of March, 1970. (appendix, A41).

On June 1, 1972, the Railroad Retirement Board advised Mrs. Finnerty that the Social Security Administration had furnished the Board with a report indicating that Mrs. Finnerty had earned $1,946.60 in 1970, and that she had been overpaid $133.00. (appendix, A28). Because Mrs. Finnerty's earnings were excessive as defined under provisions of the Social Security Act, the Railroad Retirement Board, acting pursuant to provisions authorizing suspension of payment in the manner and to the extent that the Secretary of Health, Education and Welfare would be authorized to do so under provisions of the Social Security Act, withheld Mrs. Finnerty's annuity of $82.50 per month effective June 1, 1972, for two months. Thereafter, the Board reinstated the annuity upon recovery of the $133.00 overpayment. (appendix, A52). In response to an inquiry on behalf of Mrs. Finnerty from a representative of Legal Services for the Elderly Poor, the Railroad Retirement Board stated on August 3, 1972, that Mrs. Finnerty could appeal the decision concerning the work deductions to the Director, Office of Hearings and Appeals, before June 1, 1973. Mrs. Finnerty did not appeal the decision.

ARGUMENT

POINT I.

APPELLANT'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES BARS JUDICIAL REVIEW WHEN THE AVAILABLE ADMINISTRATIVE REMEDIES DO NOT OFFEND DUE PROCESS OF LAW, AND WHEN THE ADMINISTRATIVE REMEDIES WOULD REACH UNRESOLVED FACTUAL AND LEGAL ISSUES.

Judicial review of cases arising under Title II of the Social Security Act is provided in, and expressly limited by, sections 205(g) and (h) of the Act, 42 U.S.C. 405 (g) and (h).

Section 405 (g) reads in pertinent part as follows:

> "Any individual, after any final decision of the Secretary, made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow ..."

Section 405 (h) reads in pertinent part as follows:

> "No finding of fact or decision of the Secretary shall be reviewed by any person, tribunal or governmental agency except as herein provided. No action against the United States, the Secretary, or any office or employee thereof shall be brought under Section 41 of Title 28 (the section defining the jurisdiction of the Federal Courts which has been superseded by section 1331 et. al. of new Title 28, U.S.C.) to recover on any claim arising under this subchapter.

Judicial review of cases arising under the Railroad Retirement Act of 1937, is provided for in Title 45

U.S.C. Section 228k, which reads in pertinent part as follows:

> "Decisions of the Board determining the rights or liabilities of any person under this subchapter shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act..."

The Railroad Unemployment Insurance Act, Title 45 U.S.C. Section 355 (f) provides in pertinent part, as follows:

> "...any claimant...may, only after all administrative remedies within the Board will have been advailed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review...in the United State Court of Appeals for the circuit in which the claimant or other party resides...."

The appellant claims that exhaustion of remedies is not required in the case sub judice because the administrative hearing conducted by the Railroad Retirement Board would not have passed upon the constitutionality of its recoupment procedure which affords no notice or hearing prior to Recoupment, and because the administrative remedies available under both Acts would not have passed upon the constitutionality of the joint operation of work deduction provisions of the Social Security Act and the Railroad Retirement Act against a class of persons eligible under both programs.[2/]

[2/] The plaintiff's amended complaint contends (A 18) that pursuant to 45 U.S.C. Section 288e(g) (2) "the plaintiff's total benefits under the Railroad Retirement Act are correlated with her benefits under the Social Security Act so that at no time is the total amount received from both programs greater than

The appellant relies upon the principle that the doctrine of exhaustion of administrative remedies does not apply where a plaintiff attacks the constitutionality of a statute under which an administrative agency acts and the attack does not turn upon a factual determination requiring administrative expertise. Morris v. Richardson, 346 F. Supp. 494, (N.D. Ga. 1972), vacated on other grounds, 409 U.S. 464 (1972); Gainville v. Richardson, 319 F. Supp. 16, (D.C. Mass. 1970).

Despite appellant's contentions, the need for exhaustion in this case is particularly apparent since the administrative process could have reached at least two unresolved issues of fact and law central to the appellant's complaint. First, as pointed out in the statement of facts, due to appellant's own failure to file a statement of earnings, the Railroad Retirement Board, in assessing Mrs. Finnerty $133.00, was not given the opportunity to consider that in 1970, she earned more than the allowable monthly earnings in six months of that year, and that recoupment only of overpayments in March, 1970, was appropriate. Second, appellant's claim that 45 U.S.C. Section 228e(g)(2), requires correlation of benefits under the Social Security and the Railroad Retirement Act so that a recipient under both acts is in a worse position than a person under one program, was never subjected to the agencies' application of their expertise in applying statutues, rules and regulations so that the court could properly review

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Ftn. 2 cont'd.

plaintiff's maximum entitlement under either program." The amended complaint then states (A 22) that "a person receiving benefits under both programs loses twice as much money as a person receiving the identical amount of benefits under one program." Therefore, "the double deduction denies plaintiff due process and equal protection...." Title 45 U.S.C. Section 228e(g) (2) appears in Appendix B, herein.

the constitutional issue. Since 45 U.S.C. Section 228e (g)(2), specifically refers to "more than one annuity for a month under this section," and since there is no apparent application of section 228e(g)(2), supra, to social security insurance benefits resulting from a recipient's own employment, there was a substantial issue as to plaintiff's interpretation of the statute, which issue would be more appropriately resolved by an administrative agency than a court of law. It is clear in this case that the statutory administrative review procedure would have been more than an empty formality. Williams v. Richardson, 347 F. Supp. 544, (N.D.N.C., 1972). Moreover, two recent decisions involving constitutional challenges to certain sections of the Social Security Act, have held that administrative remedies must be exhausted before the plaintiff could raise the constitutional issue. Bartley v. Finch, 311 F. Supp. (E.D. Ky., 1970), Aff'd. 404 U.S. 980 (1971); Shisslak v. Richardson, CCH UIR Vol. 1A Fed. Para. 16,238, vacated and remanded on other grounds, 462 F.2d 1370 (9th Cir., 1972). In Bartley, a three-judge court dismissed a suit challenging Section 224 of the Social Security Act, 42 U.S.C., Section 424a, stating in part:

> The manner and method of granting individuals relief under the Social Security Act are expressly provided by the terms of the act. It is an administrative procedure and can only be brought into the federal district court by its expressly legislative procedural provisions...Consequently, the express provisions of the statute must be strictly observed. These procedural rights were available to all the plaintiffs and all members of the class which they allege they represent. It must be borne in mind that whatever remedies are available must

> be timely exhausted administratively before this court can have jurisdiction.[3/]

In Shisslak, plaintiffs challenged the constitutionality of 42 U.S.C. Sections 404a and 404b, which allow the Secretary of Health, Education and Welfare to recoup overpayments by withholding funds from payments to survivors under the act. In dismissing the complaint, and denying plaintiffs' motions, to convene a three-judge court, motion for a class action, and motion for a temporary restraining order, the court stated:

> There is no question that the plaintiffs have not exhausted their administrative remedies. This is a proper case to require exhaustion of administrative remedies applying the reasoning in McKart v. United States, 89 S.Ct. 1657, 395 U.S. 196; the agency should be given an opportunity to apply its expertise and exercise its discretion and to develop the necessary facts and background, applying statutes, rules and regulations so that the court may be able to properly review the administrative actions to determine legality and constitutionality. To allow the administrative procedures to proceed may either resolve the plaintiffs' alleged problem with the Secretary, or at least narrow the issue.

Appellant also asserts that exhaustion or remedies should not be required in this case because the administrative process would not have resolved the constitutional

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[3/] The appellant seeks to distinguish Bartley from this case by stating in part (footnote 2, P. 6, Appellant's Brief) that "Bartley did not consider the futility of exhaustion." In response, it is noted that the three judge court in Bartley did not state that there were unresolved factual issues, and, in fact, proceeded on the strength of the record to render an opinion as to the constitutionality of Section 224 of the Social Security Act notwithstanding their ruling concerning exhaustion of remedies.

issue of whether the Railroad Retirement Board's recoupment of overpayments without prior notice and a prior hearing and without advising the recipient that she could apply for a waiver as provided in federal regulations, 4/ violates the due process clause of the 5th amendment. The District Court, however, lacks jurisdiction if there is a finding that the available administrative remedy which has not been exhausted does not offend due process of law. In Messer v. Finch, 314 F. Supp. 591 (ED. Ky. 1970), appeal dismissed for mootness, 400 U.S. 987 (1971), cited by the District Court (Appendix, A9), plaintiffs claimed that Section 225 of the Social Security Act, 42 U.S.C. Section 425, which allowed the Secretary to terminate Social Security benefits without notice and opportunity for a prior hearing, was unconstitutional. In granting the defendant's motion for summary judgment the court stated:

> The plaintiffs place great reliance upon Kelly v. Wyman, D.C., 294 F. Supp. 893 (affirmed under the name Goldberg v. Kelly), 397 U.S. 254, 90 S.Ct. 1011, 25 L. Ed. 2d 287) which holds that the procedure followed in New York State relative to cessation of welfare benefits denies due process to those claiming such benefits; however, the court expressly stated therein: "of course, we do not suggest that the same procedures are constitutionally requiste in all forms of social security administration. In the operation of the federally-administered old-age, survivors, and disability Insurance program, for example, the amicus brief indicates that no hearing prior to termination is available as of right. However, as the brief points out there are far fewer reasons for termination of OASDI benefits than in the AFDC program, and these reasons are based on more

4/ 20 C.F.R. Sections 255.4-9, 10-12, 13-14.

> objectively ascertainable facts. In OASDI the circumstantial changes on which termination is based are nearly always reported or confirmed by the recipient himself, and the liklihood of severe hardship resulting from erroneous termination is certainly not as great as in the welfare programs herein in issue."

In Shisslak, supra, the plaintiff claimed that the provision allowing the Secretary of Health, Education and Welfare to recoup overpayments by withholding funds from payments without prior hearing was unconstitutional. The court found that the available administrative remedies did not offend due process and that no substantial constitutional question exists. In this regard, the Ninth Circuit Court of Appeals has stated in Crow v. California Department of Human Resources Development, 490 F. 2d 580 (9th Cir., 1973), that

> The Goldberg rationale is based at least in part, upon the fact that a recipient will, upon termination, be faced with a grievous loss.

Another case, Gonzales v. Vowell, 361 F. Supp. 1230 (D.C. Tex., 1973) has distinguished between termination and reduction of benefits in determining that a post-reduction hearing did not offend due process. Cf. Knuckles v. Weinberger, 371 F. Supp. 565, 567 (D.C. N.D.C. 1973).

In as much as the District Court found (Appendix, A9) that available administrative remedies did not offend procedural due process, and that it was incumbent upon the appellant to exhaust her remedies before the Appeals Board of the Railroad Retirement Board, there was no final decision rendered which is subject to judicial review.

POINT II.

FEDERAL JURISDICTION IN THE NATURE OF MANDAMUS IS NOT AVAILABLE WHEN A PLAINTIFF DOES NOT SHOW A VIOLATION BY DEFENDANTS OF A MANDATORY STATUTORY DUTY.

To establish jurisdiction under 28 U.S.C. Section 1361, the appellant asserts that procedural due process requires the Railroad Retirement Board to give her notice and a hearing prior to recouping overpayed benefits, and that a statute and regulations[5] impose a duty on the Board to make a determination regarding fault, equity, and hardship, prior to recovery of an overpayment.

In asserting that due process requires the Railroad Retirement Board to provide notice and a hearing prior to recoupment, appellant relies in part on Goldberg v. Kelly, supra, and Elliot v. Weinberger, 371 F. Supp. 960 (D. Hawaii, 1974). Although the application of Goldberg to federally administered employment insurance and survivor's benefit programs has been questioned and limited, Messer v. Finch, supra, Knuckles v. Weinberger, supra, Crow v. California, supra, the Elliot decision did apply the mandate of Goldberg to social security cases:

> since most social security recipients depend upon their full benefits for the necessities of life, the adverse impact of an erroneous suspension or reduction upon them is great.

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[5] 45 U.S.C. Section 228i (c); appendix B
20 C.F.R. Section 255.1 (a) (b) and (c); Section 255.10; Section 255.12, appendix B.

In terms of establishing mandamus jurisdiction, however, the Knuckles decision recognizes that the duty sought to be compelled must be "a duty plainly and positively ascertained and free from doubt," (following Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218-219, 50 S.Ct. 320, 74 L. Ed. 809 (1930). In dismissing the complaint by which plaintiff sought to enjoin social security recoupment procedures under 42 U.S.C. Section 404(a)(1) and Section 404(b), on the ground that said procedures did not provide prerecoupment notice and hearings, the court in Knuckles stated:

> The question to be decided in this case on the merits is whether the Fifth Amendment requires that the Administration alter its procedures and regulations. Hence the nature and scope of the duties sought to be compelled are not plainly and positively ascertained, and free from doubt.

Moreover, in Wellens v. Dillon, 302 F. 2d 442 (9th Cir., 1962) appeal dismissed 371 U.S. 11 (1962), a mandamus proceeding to compel the Secretary of the Treasury to pay the claimant certain old age insurance benefits, it was held that the statutory remedy providing for judicial review of final decisions of the secretary (of Health, Education and Welfare) was, by the terms of the statute, made exclusive. Mandamus jurisdiction, therefore, would not lie.

Mandamus has been defined as an extraordinary remedy to compel an officer to perform a plainly defined ministerial duty. Carter v. Semens, 411 F. 2d 767, 773 (5th Cir., 1969). In addition, mandamus will not lie where the officer acts in accordance with applicable law and regulations. In re Mengel, 201 F. Supp. 687 (W.D. Pa., 1962). The duty that appellant asserts here, that the Railroad Retirement Board must provide her with a prerecoupment hearing, is neither plainly defined nor ministerial. Moreover, there is no claim that the Board ignored plain statutory and regulatory

provisions concerning recovery by deduction and appeals from the decision to recover.[6]

Appellant's second assertion seeks to impose upon the Board a duty to make a determination regarding fault, equity and hardship, prior to making a decision to recoup overpayments (Appellant's Brief, p. 21). Although the appellant recognizes that the applicable regulations[7] concerning findings of fault and determinations of hardship, by their very terms, do not provide for waiver as a matter of right (cf. 20 C. F. R. Section 255.12), she claims that the Railroad Retirement Board abused its discretion by failing to determine the questions of fault, hardship, and equity prior to recoupment, and failed to perform a ministerial duty to waive recoupment from exempt persons (Appellant's Brief, p. 22).

The application by the Railroad Retirement Board of the waiver provisions of the cited regulations is within the discretion of the Board, and is not a ministerial duty. The Third Circuit, Court of Appeals, in Richardson v. United States, 465 F. 2d 844 (1972) stated at 849:

> In order for mandamus to issue a plaintiff must allege that an officer of the government owes him a legal duty which is a specific, plain ministerial act "devoid of the exercise of judgment or discretion..."

Additionally, appellant's contention that the Board abused its discretion by not considering waiver, hardship, and equity prior to recoupment, seeks to impose a duty upon the Board which is not plainly and positively ascertainable. Cf. Knuckles v. Weinberger, supra.

While mandamus is generally a proper remedy when an officer fails to exercise, abuses, or transgresses

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[6] Cf. 20 C. F. R., Sections 260.1, 260.2

[7] 20 C. F. R., Sections 255.10-255.12, App. B.

his discretion, or where the exercise of discretion violates another's constitutional rights, it is not a proper remedy to compel or control a duty in the discharge of which by law he is given discretion. Murray v. Vaughn, 300 F. Supp. 688 (D.C.R.I., 1969). Considering the latitude of discretion conferred upon the Board by 45 U.S.C. 288 i(c) and 20 C.F.R. Section 255.12, it is improper to construe the Board's discretionary duty so as to include a mandatory duty to promulgate regulations providing for precoupment hearings on the issue of fault, hardship and equity.

POINT III.

FEDERAL JURISDICTION DOES NOT LIE UNDER 28 U.S.C. SECTION 1331 OR 28 U.S.C. SECTION 1337.

Since judicial review of cases arising under Title II of the Social Security Act and under the Railroad Retirement Act is expressly provided for, appellant possessed an exclusive and adequate remedy at law under 42 U.S.C. Section 405(h), and 45 U.S.C. Sections 228k and 355(f). Bartley v. Finch, supra. Cf. Flemming v. Nestor, 264 U.S. 854 (1960); United States v. Babcock, 250 U.S. 328 (1919).

Additionally, the amount in controversy in this case, $206.00, does not satisfy the required amount for jurisdiction to obtain under 28 U.S.C. Section 1331; and a sufficient monetary amount to obtain jurisdiction under this section cannot be reached by aggregating claims of different parties. Mills v. Richardson, 464 F. 2d 995 (2d Cir., 1972); Knuckles v. Weinberger, supra.

Appellant is also barred from obtaining the court's jurisdiction under 28 U.S.C. Sections 1331 and 1337 because of the absence of a substantial federal question (cf. decision of the District Court (appendix, page 7.) In determining the lack of substantiality in a federal

question the court may consider whether the question has been foreclosed by a prior decision. California v. City of Redding, 304 U.S. 252 (1938). Appellant's complaint against the constitutionality of work deduction provisions is foreclosed by prior determinations that such provisions do not offend the constitution. Confer Carlough v. Richardson, 445 F. 2d. 864 (5th Cir. 1971) cert. denied 404 U.S. 1026 (1972). Following the reasoning of Gainville v. Richardson, supra, the Carlough decision upheld section 203 (f) (3) of the Social Security Act. In regard to appellant's contention that under certain circumstances, correlation of benefits under the Social Security Act and Railroad Retirement Act is unconstitutionally discriminatory confer Kolonitz v. Railroad Retirement, 346 F. 2d 367 (7th Cir., 1965), which stated in construing Section 3e of the Act, 45 U.S.C. 228 c(e):

> total benefits that are payable on the basis of a claimant's wage credits under both the Social Security Act and the Railroad Retirement Act can be less than when the benefits are payable only under the guarantee provision of the Railroad Retirement Act. This anomaly, however, cannot alter the application of 3(e) as it is written. Only legislative action by Congress not judicial correction can eradicate the anomalous result.[8/]

[8/] While this decision is relied upon in determining the substantiality of the federal question, it should be recalled that appellant has not shown that her employment benefits under the Social Security Act were correlated with the annuity received as a result of her husband's eligibility under the Railroad Retirement Act.

Confer also Flemming v. Nestor, supra, and Bolling v. Sharpe, 347 U.S. 497 (1947), concerning the application of due process and equal protection standards under the constitution to public assistance laws. With respect to appellant's challenge to the Railroad Retirement Board's failure to provide for prerecoupment hearing, the same standards that were applied in Messer v. Finch, supra, Bartley v. Finch, Shisslak v. Richardson, supra, and Flemming v. Nestor, may be used in determining the substantiality of a federal question.

To obtain jurisdiction under 28 U.S.C. 1337, appellant urges the "constitutional basis" test described in Imur v. Union Railroad Company, 289 E2d 858 (3rd Cir., 1961). Although Aguayo v. Richardson, 473 F. 2d 1090 (2d Cir., 1973), and Almanares v. Wyman, 453 F. 2d 1075 (2d Cir., 1971) have held that the Social Security Act is not an act regulating commerce within the meaning of 28 U.S.C. Section 1337, the appellant's claim that the Railroad Retirement Act of 1937 was enacted under the commerce power of Congress appears to have support. (cf. 60 American Jurisprudence, 2d, Pensions and Retirement Funds, Section 8). Despite the Act's constitutional basis, there are two obstacles to obtaining jurisdiction under this section. First, it has been held, that the general grant of jurisdiction conferred by 28 U.S.C. Section 1337 does not obtain where an applicable regulatory statute precludes it. United Electric Contractors Association et al, v. Ordman, 258 F. Supp. 758 (S.D.N.Y., 1965), affirmed 336 F. 2d 776, cert. denied, 385 U.S. 1026 (1966). Thus, the applicable statutes providing for judicial review of appellant's complaints foreclose the district court from obtaining jurisdiction under 28 U.S.C. Section 1337. Second, the action must concern the validity, construction or enforcement of a statute within Section 1337, Adams v. International Brotherhood of Boilermakers, Ir n Ship Builders, Blacksmiths, Forgers and Helpers, 262 F. 2d 835 (10 Cir., 1959). In the instant case, the questions of

enforcement, validity and construction are foreclosed by a determination that a substantial federal question does not exist.

CONCLUSION.

FOR THE REASONS SET FORTH IT IS RESPECTFULLY SUBMITTED THAT THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

DATED: August 21, 1974.

Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney

BY:

WILLIAM J. DREYER
Assistant U.S. Attorney

APPENDIX B.

45 U.S.C. Section 288e(g)(1) and (2): Correlation of Payments; Social Security Benefits

(g)(1) An individual entitled on applying therefor to receive for a month before January 1, 1947, an insurance benefit under the Social Security Act on the basis of an employee's wages, which benefit is greater in amount than would be annuity for such individual under this section with respect to the death of such employee, shall not be entitled to such annuity. An individual, entitled on applying therefor to any annuity or lump sum under this section with respect to the death of an employee, shall not be entitled to a lum-sum death payment or, for a month beginning on or after January 1, 1947, to any insurance benefits under the Social Security Act on the basis of the wages of the same employee.

(2) If an individual is entitled to more than one annuity for a month under this section, such individual shall be entitled only to that one of such annuities for a month which is equal to or exceeds any other such annuity.

45 U.S.C. Section 228e(i)(1)(ii): Deductions from annuities

(i)(1) Deductions shall be made from any payments under this section to which an individual is entitled, until the total of such deductions equals such individual's annuity or annuities under this section for any month in which such individual –

(ii) will have been under the age of seventy-two and for which month he is charged with any excess earnings under section 403(f) of Title 42 or, having engaged in any activity outside the United States, would be charged under such section 403(f) with any excess earnings derived from such activity if it had been an activity within the United States, deeming such an individual who is entitled to an annuity under subsection (a)(1) of this section to

have attained age sixty-two unless such individual will have been entitled to an annuity under subsection (a)(2) of this section for the month before the month in which he attained age 60; and for the purposes of this subdivision the Board shall have the authority to make such determinations and such suspensions of payments of benefits in the manner and to the extent that the Secretary of Health, Education, and Welfare would be authorized to do under section 403(h)(3) of Title 42 if the individuals to whom this subdivision applies were entitled to benefits under section 402 of Title 42; provided, however, that in determining an individual's excess earnings for a year for the purposes of this section and section 228c(e) of this title there shall not be included in his income from employment or self-employment ceases to be qualified for an annuity or ceases, without regard to the effect of excess earnings, to be included in the computation under section 228c(e) of this title; . . .

Section 203(f)(1) of the Social Security Act (42 U.S.C. Section 403(f)(1) reads in pertinent part as follows:

> "The amount of an individual's excess earnings (as defined in paragraph (3)) shall be charged to months as follows: There shall be charged to the first month of such taxable year an amount of his excess earnings equal to the sum of the payments to which he and all other persons are entitled for such month under section 202 on the basis of his wages and self-employment income (or the total of his excess earnings if such excess earnings are less than such sum), and the balance, if any, of such excess earnings shall be charged to each succeeding month in such year to the extent, in the case of each such month, of the sum of the payments to which such individual and all other persons are entitled for such month under section 202 on the basis of his wages and self-employment income, until the total of such excess has been so charged."

Appendix B.

Excess earnings are defined in Section 203(f)(3) (42 U.S.C. Section 403(f)(3)) as follows:

> "For purposes of paragraph (1) and subsection (h), an individual's excess earnings for a taxable year shall be his earnings for such year in excess of the product of $140 multiplied by the number of months in such year, except that of the first $1,200 of such excess (or all of such excess it if is less than $1,200), an amount equal to one-half thereof shall not be included. The excess earnings as derived under the preceding sentence, if not a multiple of $1, shall be reduced to the next lower multiple of $1."

45 U.S.C. Section 228i(c): . . . recovery

(c) There shall be no recovery in any case in which more than the correct amount of annuities, pensions, or death benefits under this subchapter of the Railroad Retirement Act of 1935 has been paid to an individual or payment has been made to an individual not entitled thereto (including payments prior to July 1, 1940) who, in the judgment of the Board is without fault when, in the judgment of the Board, recovery would be contrary to the purpose of this subchapter or the Act or would be against equity or good conscience.

* * * * * * * *

20 C.F.R. Section 255.10 Waiver of Recovery

Recovery of erroneous payments may be waived in whole or in part if, in the judgment of the Board, the individual who received the erroneous payments is without fault and if, in the judgment of the Board, such recovery by any of the methods described in Sections 255.5, 255.6, 255.7, 255.8, would be against equity and good conscience.

Appendix B.

20 C.F.R. Section 255.12 Waiver not a matter of right; factors considered.

A waiver under Section 255.10 or Section 255.11 is not a matter of right, but is at all times within the judgment of the Board. The following, while neither controlling nor fully measuring the discretion of the Board, indicate the character of reasons which will be considered:

(a) whether the erroneous payment was caused by an incorrect statement made by the individual receiving such payment, and the individual knew or should have known it was incorrect;

(b) whether the erroneous payment was caused by the failure of the individual to disclose facts or make a statement while he knew or should have known to be material;

(c) whether, at the time or times of receipt of payments the individual knew or should have known the amount thereof to be incorrect and failed to inquire or advise the Board of the incorrectness of the amount of the payment or payments;

(d) the extent to which the individual is dependent upon the current payment of his annuity or pension for the necessities of life;

(e) whether the individual has, by reason of the erroneous payment, changed his position in such manner as to make recovery a severe hardship.

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AFFIDAVIT OF SERVICE

RE: FINNERTY, Appellant v. COWEN and WEINBERGER, Appellees
Second Circuit Court of Appeals - Docket #74-1668

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

Everett J. Rea, being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of James M. Sullivan, Jr.
United States Attorney

(s)he personally served three (3) copies of the printed [Record] [Brief] [Appendix] of the above-entitled case addressed to:

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2095 Broadway
Room 304
New York, New York 10023

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York on August 22, 1974.

Everett J. Rea

Sworn to before me this 22nd
day of August, 1974.

Ruth S. Molougney
Commissioner of Deeds